UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

THE PAINTING CONTRACTOR, LLC. **and** **INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES DISTRICT COUNCIL #6, AFL-CIO,**	**CASES: 09-CA-248716** **09-CA-250898** **INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL #6'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

This case is before the Board on Charging Party International Union of Painters and Allied Trades, AFL-CIO, District Council #6's (hereinafter "Charging Party" or "Union") Exceptions to Administrative Law Judge Geoffrey Carter's decision which was issued in the above matters on February 26, 2021 (hereinafter "the Decision" or "ALJD").[1] Charging Party excepts to the Decision as it relates to Respondent The Painting Contractor, LLC's (hereinafter "Respondent" or "TPC") attempt to withdraw from multiemployer bargaining after four months of negotiating and then, on TPC's assertion it could thereafter negotiate separately with the Union, Respondent's actions to frustrate individual negotiations by putting forward immediately a proposal that was regressive, unreasonable and harsh. More specifically, the Union excepts to the Judge's conclusion that Respondent unequivocally withdrew from the Greater Cincinnati Painting

[1] Citations to the Decision are referenced herein as (ALJD p. __, l.__); Joint Exhibits as (Jt. Ex. __); and the hearing transcript as (Tr. __).

Contractors Association ("Association") effective May 21, 2019, and that Respondent did not nullify its withdrawal from the Association by its subsequent conduct. Charging Party also excepts to the ALJ's conclusion that Respondent did not thereafter engage in bad faith bargaining by presenting, repeatedly, in its purported individual negotiations a proposal that was so regressive that it could only have been intended to frustrate any agreement with the Union. Respondent's bad faith bargaining prevented impasse from occurring, such that Respondent violated Sections 8(a)(1) and (5) of the Act when it unilaterally implemented its proposal on November 1, 2019.

EXCEPTION 1:

Charging Party excepts to the ALJ's finding and conclusion that Respondent unequivocally withdrew from the Association effective May 21, 2019. (ALJD p. 20, ll. 10-14).

First, the ALJ interpreted Article 19 of the expiring collective bargaining agreement (hereinafter "Agreement")[2] as allowing an employer's notice of withdrawal from the Association to be effective as long as the employer sent such notice at least 3 days before the Association executed any contract extension. (ALJD, p. 19, l. 33). The ALJ determined that because TPC sent on May 17, 2019, its notice to withdraw from the Association, and the parties did not execute a new extension in the subsequent 3 days, TPC's withdrawal notice "became timely and effective as of May 21." (ALJD, p. 19, ll. 33-35). Second, the Judge also found TPCs withdrawal "unequivocal," although he acknowledged "that the case is somewhat close on this point." (ALJD, p. 19, ll. 38-39). Charging Party takes exception to both conclusions.

It has been long held by the Board that to find an unequivocal withdrawal, "the element of good faith is a necessary requirement in any such decision to withdraw, because of the

[2] Article 19 provides, in pertinent part, that a contractor may withdraw from the Association and negotiate separately if the contractor provides written notice of withdrawal to the Union and the Association "at least three days before any extension of this Agreement is executed by the Association." (Jt. Ex.1, p. 19).

unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made." *Retail Assocs., Inc.,* 120 NLRB 388, 394 (1958). A withdrawal is not "unequivocal" where it is qualified or limited in some manner. *Universal Insulation Co.,* 149 NLRB No. 124 (Dec. 8, 1964) (employer did not unequivocally withdraw from Association where withdrawal was conditioned on the Association agreeing to a wage increase); and *NLRB v. Jeffries Banknote Co.*, 681 F.2d 893 (9th Cir. 1060) (respondent had not unequivocally withdrawn from the Association, where respondent conditioned its withdrawal on whether the Association would negotiate a specific term). Here, TPC conditioned its withdrawal on the occurrence of a future event, that is, the signing of another contract extension, so the withdrawal was not unequivocal. TPC's withdrawal was also not in good faith, as it attempted to have the "best of both worlds," by withdrawing but preserving the benefit of the new contract extension, as explained below. See *Dependable Tile,* 268 NLRB 1147, 1148 (1982).

Charging Party agrees with the Judge that TPC's May 17 email was explicit in announcing TPC's intention to withdraw from the Association and to negotiate separately thereafter. (ALJD, p. 19, ll. 39-40). However, the Judge failed to recognize that Respondent conditioned its withdrawal on the occurrence of a future event, that is, the Association executing *another* extension of the Agreement: "[I]f there is a further extension of the Agreement, then this is TPC's notice of withdrawal from the Association, contemporaneous with such extension." (Jt. Ex. 4). TPC did not unequivocally withdraw on May 17 (or May 21, as the Judge found), it instead announced its *conditional* withdrawal, dependent upon the possible occurrence of something at an unknown date in the future. In other words, if the Association did not agree to another extension, then Respondent would not have withdrawn from the Association. As the Judge correctly noted,

Respondent took the position that its withdrawal would not take effect until the Association actually executed another contract extension. (ALJD, p. 20, ll. 1-3; Tr .26, ll. 22-25). In doing so, Respondent did not unequivocally withdraw from the Association – it announced that it would do so only if the Association (to which Respondent was still bound) signed another contract extension.

Adding confusion to TPC's notice to withdraw is TPC's assertion that it "would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires." (Jt. Ex. 4). Respondent assumed, with such language, that it would be bound to the future extension even though its withdrawal would take effect upon the execution of the extension. This is where Respondent, contrary to the Judge's finding (ALJD p. 20, ll. 20-21), tried to put itself in the position of having the "best of both worlds," that is, by having the future extension apply to it even while it was withdrawing from multiemployer negotiations. TPC also assumed incorrectly, in its May 17 notice, that it would not be bound to any tentative agreement ("TA") reached between the Association and the Union *before* the parties signed another extension of the expiring Agreement.

It was only after the May 28 extension, which importantly came after a new, third TA was reached between the Association and the Union (see Exception 2 below), that TPC added to its notice to withdraw that "no agreement reached between the Association and Union that would be effective after the expiration of the current extension will apply to TPC." (Jt. Exs. 7 and 36; Tr. 27, ll. 4-12). This begs the question, why not? Article 19 of the Agreement does not permit this caveat, that the Association's agreement reached before an extension was executed would be ineffective as to the withdrawing member *after* the extension expired. (See Jt. Ex. 1, p. 19). TPC did not include such a declaration in its May 17 notice to withdraw from the Association. (Jt. Ex.

4).

Respondent's addition of this declaration on May 28, that it repeated many times thereafter, is further evidence of TPC trying to have the best of both worlds – it did not like the TA arrived at earlier on May 28 ("TA3") and so declared it "ineffective" even though TPC was a member of the Association when the Association agreed to TA3. (See Exception 2, below). TPC did not timely withdraw prior to the beginning of contract negotiations; it did not unequivocally withdraw thereafter; it participated in negotiations with and on behalf of the Association; and then, because it was dissatisfied with the result, it sought after the fact to no longer be bound by the agreement. This is contrary to and frustrates the purpose of collective bargaining.

The evidence is undisputed that the parties reached TA3 before signing an extension on May 28, 2019. Before and on May 28, 2019, in the course of negotiations, the Union refused to discuss any contract extension unless and until a TA had been reached. (Tr. p. 47, ll. 3-6 (TA1); p. 51-52, ll. (TA2); p. 63-64 (TA3)). In fact, the only reason the Union agreed to any of the extensions was to have time to put the TA before its members for ratification or rejection. (Tr. 64-65, ll. 24-03). The first and second extensions of the old Agreement ended on May 14 and May 23, respectively. (Jt. Exs. 2 and 3). Importantly, between May 24 and May 28, the Union was on strike, as no extension was in the place, and the Union had notified the Association on May 27 that it would not come off strike, *i.e.* extend the Agreement, unless and until a new TA was in place for members to vote on. (Jt. Ex. 5, p. 2, Union Chief Negotiator wrote "I cannot extend without at TA. Let's negotiate tomorrow and see if we can get another TA and extend after we negotiate."). This sequence of events renders TPC's repeated assertion beginning *after* TA 3 was executed, that "no agreement reached between the Association and Union that would be effective after the

expiration of the current extension will apply to TPC" misplaced and legally wrong. TPC participated in negotiations on May 28 as a member of the Association, and the Association agreed to TA3 with the Union, thus ending the strike. TPC violated Section 8(a)(5) when it disclaimed TA3 later on May 28 and continuing thereafter. *Health Care Workers Union, Local 250 (Trinity House)*, 341 NLRB 1034, 1037 (2004) (where the employer and union have reached a meeting of the minds, the agreement is binding).

Finally, Charging Party notes that Respondent's withdrawal could not have been "unequivocal" because neither the Judge nor Respondent nor Charging Party agree as to when the withdrawal became effective *and* what the withdrawal meant vis-à-vis TA3. A dictionary definition of "unequivocal" is "leaving no doubt; unambiguous." TPC's withdrawal clearly created doubt and was ambiguous as to its effective date.

EXCEPTION 2:

Charging Party excepts to the ALJ's finding and conclusion that Respondent did not nullify its withdrawal from the Association. (ALJD p. 20).

Even if there was a withdrawal, which there was not, Respondent nullified the withdrawal by its conduct. First, as noted in the discussion of Exception 1 above, the second extension of the Agreement expired on May 23, and on the same date, the bargaining unit rejected the second TA ("TA2") and went on strike beginning May 24. Regardless of TPC's notice of withdrawal on May 17, which the Union maintains was ineffective because it was conditional, TPC had a second opportunity to withdraw when there was no longer a contract in place, if it really intended to negotiate on its own behalf. The expiration of the extension on May 23 provided Respondent a perfect opportunity to withdraw unequivocally from the multiemployer bargaining unit, see *NLRB*

v. Southwestern Colorado Contractors Ass'n., 379 F.2d 360, 364 (10th Cir. 1967), and to initiate its own negotiations.[3] But TPC did not do so, and this failure to act nullifies its previously-stated intent to withdraw.

Respondent could have notified the Union that it was withdrawing from the Association immediately on May 24, and that it wanted to negotiate separately at any time on Friday, May 24; Saturday, May 25; Sunday, May 26; or Monday, May 27, to end the strike. During this 4-day period, there was no collective bargaining agreement or extension in effect. Despite this, TPC did not communicate to the Union at all, even though the Union was on strike against TPC and the other employers. (Tr. 94, ll.20-25). This was an undisputedly appropriate time for TPC to withdraw unequivocally from multiemployer bargaining, but TPC did not do so. See *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2nd Cir. 1966); and *NLRB v. Sklar,* 316 F.2d 145, 150(6th Cir. 1963)("[W]ithdrawal in the instant case occurred after the expiration of the most recent multiemployer agreement. This is precisely the time at which the Board will permit withdrawal from multiemployer bargaining" (internal citation omitted)).

Additionally, Respondent also nullified its purported withdrawal by negotiating with the Union on May 28, as part of the Association, and reaching TA3. On May 26, 2019, while the strike was in effect, TPC communicated to other employers in the Association that it would only agree to "a short term extension" to end the strike, but not to "the proposed tentative agreement," presumably TA3. [4] But importantly, TPC did not communicate this to the Union, and neither did

[3] The Judge actually found that TPC's withdrawal was effective May 21, 2019, meaning that TPC was not even part of the Association on May 24, 2019, when the strike began.

[4] Again, the Judge's conclusion was that TPC had withdrawn from the Association by this time, and that TPC's "mistaken belief" otherwise does not change the date of the allegedly unequivocal withdrawal. (ALJD p. 20, l.16).

the Association. (Jt. Ex. 5; Tr. 55-60). On May 27, another employer in the Association reached out to the Union and expressed an interest in ending the strike. (Jt. Ex. 5, p. 2). The Union responded that it could not just end the strike, that it "cannot extend without a TA. Let's negotiate tomorrow and see if we can get another TA and extend after we negotiate." (Jt. Ex. 5, p. 2). The Union's response was sent to employers in the Association, including TPC. *Id.* Respondent knew on May 27, then, that Charging Party would not end the strike until after a new tentative agreement was reached.

By email on May 27, the Association and the Union agreed to meet on the morning of May 28, 2019. (Jt. Ex. 36, p. 5; Tr. 60, 136). TPC did not ask to meet or negotiate separately. On May 28, 2019, Respondent appeared with the Association members in Cincinnati at the Union Hall, to negotiate an end to the strike. (Tr. 60, 136). The Union assumed Respondent was there as part of the Association. (Tr. 66-67). Had TPC actually withdrawn from the Association, it would not have appeared to negotiate with the Association. And, the Union would not have permitted Respondent's representative, Walker, to attend the May 28 session if the Union understood that TPC had withdrawn from the Association. (Tr. p. 66, ll. 9-11). During the meeting, the Union and the Association agreed to TA3. (Jt. Ex. 24). Respondent did not say anything about TA3 during the meeting, nor did it object to the agreement or claim that it would not be bound by it. (Tr. 65-66). Accordingly, the Union concluded negotiations on May 28 – before an extension was signed – believing it had a meeting of the minds among all the employers who were present, without regard to whether Respondent was part of the Association or not. Only because of this, the Union agreed to another extension, until June 5, to secure a ratification vote while ending the strike. (Tr. 63, 64, 137; Jt. Ex. 36).

After the meeting on May 28, the Union notified its members the strike was over because of TA3 and the extension, and the members could return to work that day. (Tr. 67-68, 138). By all appearances, Respondent was a member of the Association when TA3 was reached, regardless of whether it voted "yes" on TA3 or not.[5] The extension came after TA3, and TPC insists it withdrew at the moment the extension was signed, which means after TA3. Once there is a meeting of the minds and an agreement is reached, it is binding on the parties. See *Health Care Workers Union, Local 250 (Trinity House),* 341 NLRB 1034, 1037 (2004). By disavowing TA3 after the fact, Respondent violated Section 8(a)(5) of the Act beginning on May 28, 2019. (Jt. Exs. 7, 9, 16, 36).[6]

Also of note is that after counsel for Respondent learned of the events on May 28, 2019, Respondent's counsel communicated a slightly different version of its withdrawal to the Union. On May 28, 2019, at 5:14 PM, Respondent's counsel communicated to the Union and the Association that, because an extension had been signed early that day, "TPC is no longer represented by the Association, and no agreement reached between the Association and the Union that would be effective after the expiration of the current extension will apply to TPC." (Jt. Ex. 7). As argued above, this assertion is legally incorrect because an agreement reached between the Association and the Union before another extension is signed is binding on TPC, especially after TPC did nothing to bargain individually with the Union when it had a clear legal right to do so, between May 24 and May 28, 2019. TPC's inaction with regard to the Union between May 24

[5] TPC admits it was a member of the Association when it participated in the negotiations on May 28, but it falsely reverses the order of events at negotiations that day, suggesting wrongly that the extension occurred before TA3. (Tr. 25-26).

[6] The cases cited by the Judge in FN 12, pp. 20-21 are ones where the employer's withdrawal preceded the activity that nullified the withdrawal; here, TPC's withdrawal came after TA3 was agreed to, making TPC bound to TA3.

and May 28, during a strike and after the old Agreement had expired, coupled with its silent participation in negotiations specifically to end the strike on May 28 and its assent to an extension of the Agreement (which it earlier asserted was the condition precedent to its withdrawal from the Association), nullified its withdrawal attempt.

EXCEPTION 3:

Charging Party excepts to the ALJ's finding and conclusion that Respondent could implement unilaterally its Company Proposal on November 1, 2019, because of a good-faith impasse. (ALJD p. 24, l. 14).

A. Negotiation Issues and Outcomes Between February 11 and May 28, 2021.

The parties here bargained approximately 10 times between February 11 and May 28, 2019. (Jt. 36, Item 10). In the course of negotiating, between April 23 and May 28, the parties reached three TAs. (Jt. Exs. 21, 22 and 24). The TAs were quite similar to each other, addressing at most six (6) proposed changes to the Agreement. (Id.) The changes the parties agreed upon in that time period included:

- Increasing the contribution to the Industry Pension Fund
- Increasing the per diem for travel
- Changing the Bridge Classification description and pay
- Eliminating the 3 cents/hour contribution to the Drug Free Workplace Program
- Increasing the base hourly pay rate for all bargaining unit members
- Reducing the Target Fund contribution from 25 cents per hour to 5 cents per hour

The parties executed their first TA on April 23, 2019. (Jt. Ex. 21). The old Agreement was unchanged in all terms that were not specified in TA1, and this remained true with TA2 and TA3 also. (Tr. 95-96). In fact, TA2 and TA3 reflect that the parties were only negotiating the above-bulleted items, and changes to them, between April 23 and May 28, meaning the parties were in agreement by May 28, 2019, that all other provisions in the old Agreement would remain

the same. (See Jt. Exs. 21, 22 and 24; Tr. 95-96). It is undisputed that TPC was a member of the Association from February 11 through at least May 21. Further, Kevin Walker represented Respondent in the negotiation sessions up to and including the last session on May 28, 2019 (Tr. 43, 44, 48, 39, 61, 132, 133, 136, 137). Accordingly, Respondent knew that the only terms of the old Agreement which were still being negotiated on May 28 were the provisions included in TAs1, 2 and 3.

B. TPC's First Individual Proposal to the Union on May 30, 2019.

Two days after TA3 was agreed to, on May 30, 2019, Respondent emailed the Union a comprehensive contract proposal, alleging it was not bound to TA3 and now negotiating only for itself. (Jt. Ex. 9, p. 1). Respondent's proposal brought forward issues that had never been addressed in the 10 previous negotiation sessions. (Tr. 71, ll. 7-11: Q: "[H]ad the items proposed on May 30th by Respondent been discussed at all during negotiations between the Association and the Union prior to? A: No (Union Chief Negotiator)). Especially notable of these issues was the elimination of the Union's pension plan. (Jt. Ex. 9, pp. 3, 7 Art. XV). Respondent undisputedly had agreed to TA2 a few weeks before, and TA2 included the continued participation of bargaining unit members in the IUPAT Union and Industry National Pension Fund (the "Fund"), and the continued contribution by Employers to the Fund.[7] (Jt. Ex. 22). Yet only two days after participating in negotiations for (and by all appearances agreeing to) TA3, which included increased Employer contributions to the Fund, TPC presented the Union with a "Company proposal" that completely eliminated any contribution to and participation in the Fund. (Jt. Exs. 9 and 36, p. 6).

[7] The Fund provides defined pension benefits to participants, a retirement benefit that is both unique in today's society and vital to the construction trade unions.

Additionally, TPC's May 30 proposal included the elimination of basic Union rights and privileges that also had not been addressed or challenged in any of the 10 previous negotiation sessions, including the elimination of contract provisions on Union stewards, dues check-off, Union security, Union training, and the arbitration of grievances. (Jt. Ex. 9, pp. 5-8, *cf* Jt. Ex. 1 (the expiring Agreement)). The Judge mistakenly concluded that in its proposal on May 30, TPC "offered to increase the wages of several job classifications in exchange for ending contributions to various fringe benefit funds." (ALJD, p. 25, ll.7-8). In fact, the proposed elimination of the PAC, Target Fund, Building Fund and Drug Free Workplace "plans" (as incorrectly described by TPC counsel on Jt. Ex. 9, p. 3) are not "plans" at all: they are funds created from Union dues, not employer contributions. (See Jt. Ex. 10A showing Employer Contributions vs. Dues Deductions; also Jt. Ex. 1, Article XV, identifying Employer contributions). On May 30, then, TPC really proposed increasing Union employees' wages primarily through the elimination of Union dues being deducted from their wages, which certainly is an offensive proposal to the Union and undermines the Union's position as the bargaining representative.

Respondent's May 30 proposal also included an entirely new Article, "Management Rights," in which it retained for itself the authority to make unilateral changes to working conditions that are mandatory subjects of bargaining. (*Id.*, p. 9). Finally, Respondent's proposal on May 30, 2019 was for a contract that would only be for 11 months, whereas TA1, TA2 and TA3 were each for a three-year contract. (Jt. Ex. 9, p. 7 Article XIX *cf* Jt. Exs. 21, 22 and 24). The proposed duration language from TPC also did not provide for any renewal possibility, only that the contract "shall then terminate." *Id.* These many changes, all of which were regressive in comparison to the expiring Agreement and negotiations up through May 28, were simply not

"reasonably comprehended" in TPC's bargaining proposals, as part of the Association, between February 11 and May 28. See *American Federation of Television and Radio Artists v. NLRB,* 395 F.2d 622 at 624 (unilateral changes upon good faith impasse must be "reasonably comprehended within" the pre-impasse proposals).

C. TPC Repeats Its Offensive Proposal to the Union and Implements It Nov. 1, 2019.

The Union membership ratified TA3 on June 5, resulting in a new 3-year Agreement that looked substantially similar to the expired Agreement. (Jt. Exs. 1 and 11). Denying it was bound to the new Agreement, Respondent re-issued its regressive, offensive proposal to the Union on September 19, 2019. (Jt. Ex. 14). The Union did not counter the proposal, maintaining its position that TPC was bound to the new Agreement. (Tr. 80). On October 7, 2019, TPC sent the Union its proposed working rules and agreement (Jt. Ex. 30), that were similar to the Company Proposals of May 30 and Sept. 19, all of which contained substantially different terms than TA1, TA2 or TA3. Additionally, TPC's proposals were substantially different from the expired Agreement to which TPC had been bound through June 5, 2019. On October 28, 2019, TPC told its employees it would implement its working rules and agreement effective November 1, 2019 (Jt. Ex. 36). The Union responded to TPC on October 29 that it believed TPC bound to the new Agreement; that the Union would negotiate with TPC if the Board determined TPC was not bound to the new Agreement; and that the parties should maintain the *status quo* in the meantime by adhering to the terms of the expired Agreement. (GC Ex. 2). Respondent declined and implemented its working rules and agreement on November 1, 2019.

The Judge wrongly concluded "I do not find that Respondent's contract proposal was unlawfully regressive." (ALJD, p. 25, l.6). A complete review of the document demonstrates the

opposite – that the proposal was offensive to basic Union concepts and entirely regressive. The "Company proposal" that TPC implemented on November 1, 2019 (Jt. Ex. 30), which closely mirrored its May 30, 2019, proposal (Jt. Ex. 9), did the following, none of which had been proposed in the 10 negotiation sessions in 2019 that Respondent participated in between February 11 and May 28:

- added a Management Rights Article, in which Respondent retained authority to make unilateral changes to just about every term and condition of employment except wages;
- eliminated Union security (in a non-Right to Work state)
- eliminated Union dues checkoff (and claimed a wage increase to members as a result)
- eliminated 9(a) language
- eliminated specialty wage rates for certain job functions
- eliminated required safety training
- eliminated some Union Steward provisions
- eliminated work preservation provisions
- eliminated out of area work conditions
- eliminated certain training and industry funds
- eliminated Apprentices and related training provisions
- eliminated the Union pension fund as the members' retirement plan
- changed the grievance and arbitration procedure
- eliminated bonding requirements
- eliminated no strike/lockout language
- eliminated restrictions on terminating the agreement
- limited the length of the Agreement to only 11 months
- provided the Agreement would terminate, without any renewal option

The Judge was mistaken, then, in determining "it is debatable whether Respondent's proposal was more or less favorable to union members than TA2 or TA3." (ALJD p. 25, l. 15). Neither TA2 nor TA3 included any of the changes set forth in the bulleted items above, nor did TA2 and TA3 eviscerate the pension benefits the bargaining unit members had enjoyed under the old Agreement (and which continue under the new Agreement). Respondent's proposal was both anti-Union and immensely less favorable to union members than TA2 or TA3, each of which left much of the expiring Agreement unchanged for the subsequent three years. The Union's Business

Manager and Chief Negotiator Jim Sherwood accurately and succinctly described TPC's proposal as being a "significantly less overall wage package" that "also strips everything out that makes them union." (Tr. 81).

The Judge appears to have failed to consider the testimony offered by one of the affected Union members regarding TPC's unilateral implementation of its proposal. Long-time TPC employee David Henn testified he was "pretty ticked off" that TPC was going to stop paying into his Union benefits on November 1, 2019. (Tr. 170). Henn said "And I got very aggravated with it, you know. I mean, I won't cuss, but to me, it was just a load of B.S. And three days before they [TPC] were going to quit paying into my benefits, I mean, I just, you know, to just being two options," which were to accept what TPC offered at that point and withdraw from the Union, or to go find a job with another Union contractor. (Tr. 171-73). Henn ended up doing the latter, rather than losing his Union benefits. (Tr. 169).

In light of all of the above, the Judge was incorrect in concluding that the Company proposal did not demonstrate an intent by Respondent to frustrate negotiations and to avoid reaching an agreement, and that a good faith impasse existed on November 1, 2019. Contrary to the conclusion of the Judge, the record of evidence in this case establishes that TPC's Company Proposal, which it proposed first on May 30, 2019, and then implemented unilaterally on November 1, 2019, was "so harsh, vindicative, or otherwise unreasonable as to warrant a conclusion that they were proffered in bad faith." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018)(internal quotation marks and citations omitted). The terms TPC implemented unilaterally on November 1, 2019, left the Union and its members with few, if any rights, while grossly expanding Management Rights and offering only six months (Nov. 1 – April

30) of remaining contract life. See *American Automatic Sprinkler Sys.*, 323 NLRB 920 (1997)(bad faith bargaining prevented impasse where proposals left Union with fewer rights and proposals cut back on existing terms and conditions of employment); *American Federation of Television and Radio Artists v. NLRB,* 395 F.2d 622, 629 (employer cannot unilaterally implement changes that are designed to undermine a union's status as bargaining representative). TPC violated Sections 8(a)(1) and (5) in proposing, insisting to impasse over the Union's good faith and reasonable objections, and unilaterally implementing its own terms on November 1, 2019.

Dated: March 26, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing documents, Charging Party's Exceptions to the ALJ's Decision and Charging Party's Brief in Support of its Exceptions to the ALJ's Decision, were served this 26th day of March 2021 by electronic mail to the following:

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